U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 25 August 2004

CASE NUMBER: 2004-LHC-230

OWCP NO.: 07-165398

IN THE MATTER OF

DANIEL P. MELANCON, SR.,
Claimant

v.

HALTER MARINE/FREIDE GOLDMAN OFFSHORE,
Employer

and

ZURICH AMERICAN INSURANCE CO.,
Carrier

APPEARANCES:

Arthur J. Brewster, Esq.
On behalf of Claimant

J. Louis Gibbens, Esq.
On behalf of Employer/Carrier

BEFORE: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.,* brought by Daniel P.

Melancon, Sr. (Claimant), against Halter Marine, Inc. (Employer), and Zurich American Insurance Co. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. A hearing before the undersigned was held on June 10, 2004, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their respective positions.[1] Claimant testified, and introduced nine exhibits, which were admitted, including: Claimant's wage records; medical records from Houma Orthopedic Clinic, Family Doctors Clinic and Chabert Medical Center; UNUM Life Insurance Company of America records; correspondence from and deposition of Dr. Kinnard; and medical records of Dr. Abben. Employer introduced eighteen exhibits, which were admitted, including: Claimant's deposition; Employer's 8(f) application; UNUM records; medical records from South Louisiana Medical Center, Houma Orthopedic Clinic, Family Doctor Clinic, Ochsner Medical Institutions, Cardiovascular Institute of the South and Terrebonne General Medical Center; various Department of Labor filings; and Claimant's personnel file with Employer.

The parties filed post-hearing briefs. Based upon the parties' stipulations, the evidence introduced, my observation of witness demeanor, and the arguments presented, I make the following findings of fact, conclusions of law and order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An accident occurred on May 10, 2002.

2. An employer/employee relationship existed at the time of the incident.

3. Employer was advised of the injury on November 16, 2002.

4. Employer filed a Notice of Controversion on June 12, 2003.

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__: Claimant's exhibits (CX-__, p.__); Employer exhibits (EX-__, p.__); Joint exhibits (JX-__, p.__).

5. An informal conference was held on August 14, 2003.

6. Claimant reached maximum medical improvement on November 14, 2002.

7. Claimant suffers a 25% permanent physical impairment to each leg.

8. Claimant's average weekly wage at the time of injury was $734.00.

III. ISSUES

The parties presented the following unresolved issues:

1. Timeliness of the claim and notice to Employer;

2. Causation of Claimant's injuries;

3. Nature and extent of injuries;

4. Entitlement to medical benefits;

5. Section 8(f); and

6. Interest, penalties, and attorney's fees.

IV. STATEMENT OF THE CASE

A. Chronology

Claimant began working in the shipyards in 1963. He commenced his work at Employer in 1972 as a helper, working his way up to welder, leaderman, foreman, quality control inspector and analyst. In the 1970's Claimant began experiencing problems with his knees. He initially treated with his family practitioner and at South Louisiana Medical Center, where he was diagnosed with bilateral degenerative osteoarthritis of the knees. Employer closed its facilities for

two years in 1986-1988, and Claimant underwent bilateral arthroscopic surgery on January 26, 1988. When the yard re-opened, Claimant returned to work.

In 1994, Claimant went to orthopedic surgeon Dr. Landry for treatment of his knee problems. Dr. Landry diagnosed Claimant with degenerative arthritic changes of the bilateral knees and discussed possible surgical options, including tibial osteotomy and total bilateral knee replacement. Claimant treated with Dr. Landry a second time in 1995, after which he treated with his family practitioner. In the mid-1990's Claimant was promoted from welder supervisor to quality control inspector; this job required him to crawl in and out of ships to ensure the workers were performing the job to specification. In 1999, Claimant requested a transfer to quality control analyst as the inspector position was too stressful on his knees. His supervisors agreed, and assigned him to the analyst position, which was light duty.

In February, 2002, Claimant received initial notice that the shipyard would be closed down. On April 18, 2002, he received further instructions that the shipyard would close in June, 2002, and that he would continue to be employed through May 28, 2002. During this time, Claimant sent out applications to other shipyards for similar positions, but was not hired anywhere. On May 1, 2002, Claimant treated with orthopedic surgeon Dr. Kinnard for his bilateral knee pain which had become intolerable. A bilateral total knee replacement surgery was scheduled for, and performed, on May 14, 2002. Claimant filed a claim for long term disability on July 12, 2002, and a claim for benefits under the Act on November 3, 2002. He has not worked since May 10, 2002.

B. Claimant's Testimony

Claimant is a high school graduate residing in Raceland, Louisiana, with his wife of 39 years. He has two grown children. After high school, Claimant went to work for the shipyards starting out as a helper at Avondale in 1963 until 1972, when he took a job with Employer. He testified he worked his way up the shipyard ladder, holding positions as tacker, welder, welder leaderman, welder foreman, quality control inspector and quality control analyst. (Tr. 19-22).

Claimant testified he began having problems with his knees when he started at Employer in the 1970's. His right knee was the first to bother him, but the pain was not severe enough for him to seek medical attention. Claimant first sought medical treatment for both of his knees from Dr. Landry who initially offered to

restructure his legs and cast them, but informed Claimant he was too young for such procedure. (Tr. 22-23). Claimant returned to work at the shipyard after seeing Dr. Landry, but his knees kept getting worse. He treated with his family physician, Dr. Marcello, who prescribed medication and administered shots; Dr. Marcello also told Claimant he was too young for surgery. During this time, Claimant was transferred from welding supervisor to quality control. His duties in quality control included crawling in and out of the ship to check that the welders and fitters were performing their work according to the drawings and specifications. Claimant was required to climb and crawl on ships still under construction and spent a lot of time on his feet and on his knees. He stayed in that position for 12 years. (Tr. 23-25).

During his time as quality control inspector, Claimant testified he continued to have problems with his right knee for which he treated with Dr. Marcello. Between 1986 and 1988, when Employer had closed down, Claimant underwent arthroscopic surgery on both of his knees at Chabert Medical Center. At his deposition Claimant testified the doctors at Chabert informed him his knees were wearing out in part because of his crawling and walking in the shipyards. (EX-2, p. 15). He returned to the shipyard when Employer re-opened and did not have any problems performing his job duties in the quality control department, although he did have continued problems with his knees. Claimant described the problems as a constant pain that he had learned to live with. Eventually the pain became so severe he had problems walking, prompting him to become a quality control analyst instead of inspector. At his deposition, Claimant testified the analyst position was light duty and mostly involved sitting at a desk using a computer. Claimant further testified his supervisors put him in this analyst position to accommodate his knee condition, and that his co-workers nicknamed him "Ducky" because his knee pain caused him to walk side to side. (Tr. 25-32; EX-2).

At the hearing, Claimant clarified the production control analyst position did not require crawling, but involved walking and climbing. Claimant testified this new job was easier on his knees in the beginning, but they worsened over time. He was required to take pictures from onboard the vessels, which involved climbing up to nine flights of stairs to reach the top deck; occasionally he was not able to get down and needed to be lowered in a crane-operated bucket. The job required carrying up to 50 pounds of paper. Claimant also had office duties; he received all the drawings, filed them and delivered them to various departments in 20 different buildings throughout the yard. (Tr. 28-32). On cross, Claimant testified he worked 5 days per week, and four of those days were spent in the office doing paperwork;

on the fifth day he would spend 3-5 hours making deliveries around the yard and take photographs. (Tr. 65, 72).

Claimant testified he continued to see Dr. Marcello for his knee problems, but the medication he prescribed did not help. At the urging of his son, he traveled to Oklahoma to treat with Dr. Forstall, who declined to operate secondary to Claimant's young age of 52 years but performed Synvisc shots instead. Claimant stated the shots did not help his pain. Claimant returned to work at the shipyard following the shots. (Tr. 32-34). Claimant testified he visited Dr. Kinnard on May 1, 2002, as a last resort. Dr. Kinnard initially told Claimant he was too young for anything, even though Claimant was 57 at the time. Dr. Kinnard then took x-rays and, at Claimant's urging and agreed to perform knee replacement surgery on both knees. On cross, Claimant stated he had never been offered a knee replacement surgery and had to insist to Dr. Kinnard that he wanted the surgery. Claimant did not recall discussing the possibility of a high tibial osteotomy or total knee replacement in 1984, secondary to significant arthritis. He had no explanation why his physicians stated his knee condition was not related to his employment. Claimant testified his cardiologist, Dr. Abben, cleared him for surgery, which was performed May 14, 2002.[2] (Tr. 32-36, 62-64, 67).

Claimant testified he continued to work after May 1, 2002, when his surgery was scheduled. He stated his knee condition was affecting his ability to work in that he had difficulty walking and climbing. However, on cross-examination, Claimant testified he was able to perform all of his job duties and nobody complained he was slacking off or that he was not fully performing his job. (Tr. 57, 60-62). Claimant's last day of work was May 10, 2002; on this day he slipped and fell on one knee when leaving his office. He testified nobody witnessed his fall, but he told Debbie Loup in the administrative office about it. Claimant testified he told Dr. Kinnard about his fall, but it did not result in a worsening of his knee condition. (Tr. 36-39, 57). Furthermore, at his deposition Claimant testified the fall must have occurred prior to May 1, 2002, because it was the precipitating cause and main factor in his decision to see Dr. Kinnard and request the surgery. (EX-2).

Claimant further testified he knew the yard was closing but he had not been told officially about the precise date. On cross-examination, Claimant testified he received a notice dated April 18, 2002, informing him he would continue to be

[2] Claimant testified he had a heart attack in 2000 requiring in open heart surgery. He returned to work 5 weeks after the surgery. (Tr. 36).

employed through May 28, 2002, at which time he would be laid off with no bumping rights. Based on the information in this letter, Claimant admitted he knew when the yard was going to close. After finding out that the yard was closing, and before his knee surgery was scheduled, Claimant sent out 15-20 resumes to shipyards and office buildings; he interviewed with Bollinger for a position as estimator but did not get the job. This position involved many of the same physical requirements as his job at Employer and Claimant applied even though his knees were affecting his ability to work. (Tr. 52-54, 56-57, 59).

Fox-Everette, Employer's health insurance provider, paid for Claimant's knee replacement surgery. Claimant testified he had to receive approval from Employer's human resources office, Ms. Loup in particular, to receive the surgery. He remained in the hospital for four days before going home and attending therapy. Claimant testified he told Employer he was getting his knees replaced; while he was at home he called Debbie Loup every three days to explain his absence from work. At the end of May, 2002, Ms. Loup informed Claimant he had been laid off; he never received a pink slip or termination notice. After his lay off, Claimant took out an 18-month COBRA health insurance policy. Claimant has not worked since May 10, 2002. He applied for and received long-term disability benefits through UNUM and Social Security. (Tr. 39-43, 45).

Claimant testified he treated with Dr. Kinnard until his COBRA plan ran out. Dr. Kinnard restricted Claimant from running and jumping, and informed him he would have difficulties climbing, especially climbing down stairs. Dr. Kinnard informed Claimant he would not be able to return to the type of work he was doing at Employer. (Tr. 44-45). Claimant testified his last job at Employer was considered administrative but required frequent twisting, bending, pushing and occasional climbing, kneeling and squatting. He further testified neither UNUM nor Employer requested him to meet with a vocational expert or medical doctor. (Tr. 47-49). However, he testified that he talked with a representative from UNUM on August 20, 2002, but did not recall discussing his lack of short term disability, worker's compensation, unemployment benefits, or his desire not to return to work. (Tr. 59-60).

Since his surgery, Claimant has been unable to kneel and he can only walk for short periods of time. He takes anti-inflammatory medications as prescribed by Dr. Marts at Charbert. (Tr. 51-52, 68). Claimant testified he initially retained counsel to explore a hearing loss claim; he first learned he may be entitled to compensation for his knee condition from his attorney. Claimant clarified this was well after he had his knee surgery. Specifically, he saw Mr. Bode for a hearing

evaluation in 2003 and Mr. Bode referred him to a lawyer; this was after Claimant was laid off, had his surgery and filed for disability benefits. However, on cross Claimant admitted that he filed the present claim in November, 2002. (Tr. 49, 68, 70-71).

C. Medical Evidence

The medical evidence indicates Claimant has a long history of bilateral knee degenerative joint disease, as well as chronic heart disease and seizure disorders. In 1987, he treated at the Leonard J. Chabert Medical Center for his knee problems, at which time his doctors noted he was obese and suffered from bilateral knee degenerative joint disease. Claimant underwent a bilateral arthroscopic surgery on January 26, 1988. (CX-6, pp. 51, 64, 81).

Claimant treated with Dr. Landry at the Houma Orthopedic Clinic on December 5, 1994, and July 10, 1995, for his knee problems. Dr. Landry noted Claimant suffered chronic bilateral knee pain and underwent a prior bilateral arthroscopic surgery. Upon physical examination in 1994, Dr. Landry noted Claimant's knee condition was getting progressively worse. He could not squat and he had a bow-legged deformity in both legs. X-rays revealed marked medial joint arthritis. Dr. Landry recommended either a high tibial osteotomy or total knee replacement. In 1995, Dr. Landry noted severe osteoarthritic changes existed in both of Claimant's knees. (CX-3, pp. 2-11).

Claimant next treated at the Family Doctor Clinic in August, 2000, and January, 2001, for his knee condition. The physician noted bilateral severe degenerative joint disease and degenerative bow-legged conditions at both visits. (CX-5, pp. 20, 28).

Claimant first treated with Dr. Kinnard, a board-certified orthopedic surgeon, on May 1, 2002, when his chronic knee pain became intolerable. Dr. Kinnard noted a significant history of bilateral arthroscopic surgery, severe arthritis in both knees and testified Claimant had been given the option of a tibial osteotomy or total knee replacement as early as 1994. At this initial visit, Dr. Kinnard found Claimant to be obese, with a height of 5'8" and weight of 240 pounds. He noted Claimant suffered chronic bilateral knee degenerative arthritis since 1984 and was bow-legged. (CX-9, pp. 5-8). Dr. Kinnard further testified Claimant's pain increased over time, but there was no one event which precipitated

the initial visit. He clarified if Claimant had given him a history of falling or otherwise injuring his knee, it would have been recorded. (CX-9, pp. 9, 12).

Dr. Kinnard testified he discussed the possibility of a bilateral total knee replacement with Claimant. Although Dr. Kinnard did not prefer to perform this operation on both knees at once, he agreed to do so at Claimant's request. The surgery was performed on May 14, 2002, and Claimant tolerated it well. (CX-9, pp. 8-9). Following the surgery, Claimant attended physical therapy sessions for three months, which improved his range of motion and strength while decreasing his pain levels. (CX-3, pp. 7-10). Dr. Kinnard testified Claimant was placed on anti-coagulation medication to prevent blood clots, but because of his heart condition the dosage was higher than normal and resulted in bleeding inside his right knee. This caused some stiffness but resolved over time. (CX-3, p. 12; CX-9, p. 10).

On July 31, 2002, Dr. Kinnard assigned Claimant a 25% permanent impairment rating to both of his knees and opined he would not be able to return to labor activities. He continued to treat Claimant until November 13, 2002. (CX-3, pp. 12-15). At his deposition, Dr. Kinnard testified Claimant would only be capable of sedentary to light duty work activities. He added that Claimant had accepted an office job in May, 2002, of which he approved. Dr. Kinnard further testified Claimant could reasonably expect to reach maximum medical improvement from six months post-operation, or by November 14, 2002. He further testified Claimant should be restricted to sedentary activity levels, specifically no walking or climbing, so as to minimize the stress on his knee replacements. (CX-9, pp. 18-21).

Finally, Dr. Kinnard testified Claimant's continued work in manual labor conditions aggravated his pre-existing degenerative bilateral knee conditions. General activities, such as walking and climbing, sped up the need for Claimant to undergo bilateral knee replacement surgery. (CX-9, p. 21).

D. History of the Claim

Claimant was laid off from Employer on May 28, 2002, secondary to a planned reduction in force and the closing of Employer's Lockport shipyard. (EX-6, pp. 7, 9). On July 12, 2002, Claimant filed for long term disability through UNUM, indicating he had degenerative osteoarthritis in both of his knees beginning in 1985, and that the condition was due to a sickness unrelated to his

employment. (EX-4, p. 7). On November 3, 2002, Claimant filed his claim for disability benefits under the Act, listing May 10, 2002, as his date of injury and stating that "work conditions aggravated a pre-existing arthritic condition in both knees." (EX-2). Employer filed its First Report of Injury on November 26, 2002 and its Notice of Controversion on June 12, 2003. (EX-1; EX-4).

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he has suffered a compensable injury under the Act, as his knee arthritis was made progressively worse by his work in the shipyard. Claimant also contends he did not know he had a compensable knee injury, under the Act, until he met with his lawyer in the fall of 2002. He argues he provided timely notice of his disability in that he filed his claim within 30 days of when he discovered his injury was causally related to his employment and inability to earn wages. In the alternative, Claimant asserts untimely notice is excused by Employer's knowledge of his knee injury and by the fact that Employer was not prejudiced by lack of notice. Further, Claimant contends his claim was timely filed, as he filed it within one year of becoming disabled. As he is unable to perform his prior job duties due to his inability to walk and climb secondary to his knee replacement, and as Employer did not produce evidence of suitable alternative employment, Claimant contends he is entitled to permanent total disability benefits.

Employer contends there was no accident on May 10, 2002, which would have caused Claimant to undergo knee replacement surgery; rather, it contends his knee condition was pre-existing and not work related. Further, Employer argues it did not have notice or knowledge of Claimant's accident/injury until November 10, 2002, after Claimant filed his claim for compensation. Employer argues it was prejudiced by the lack of notice in that Claimant had already undergone the surgery. Employer was unable to conduct a pre-surgical IME or investigate the claim as the yard was closed in June, 2002. Instead, Employer contends Claimant decided to have surgery, despite no worsening of his knee condition, because the yard was going to close and he was going to lose his medical coverage. As such, Employer argues Claimant's failure to provide timely notice bars his claim. In the alternative, Employer seeks Section 8(f) relief for any compensation benefits which may be awarded Claimant.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass's v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); Hall *v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); Atlantic *Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); Arnold *v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In the present case, there are numerous contradictions among Claimant's hearing testimony, deposition testimony and the remainder of the record. Specifically, Claimant testified at hearing that he first sought treatment for his knees from Dr. Landry, whereas the medical records indicate he did not treat with Dr. Landry until 1994, after his bilateral arthroscopic surgery in 1988. Claimant also testified he did not know his knee problems were work related until November, 2002, but at his deposition he testified the doctors at Chabert informed him in the 1980's that walking and crawling around the shipyard was causing his knees to wear out. Claimant further testified at the hearing that his knee problems affected his ability to work, but on cross he stated that he did not have any problems performing his job duties, inasmuch as his supervisors did not complain about his work. At the hearing, Claimant described his job as production analyst as requiring lifting of 50 pounds and extensive walking and climbing; at his deposition he testified it was a light duty position given him to accommodate his knees, did not involve lifting, and only required some walking 3-5 hours per week. Claimant testified at the hearing that he fell on May 10, 2002 and hit his knee, but it did not worsen his condition. However, at his deposition he testified the fall must have occurred prior to May 1, 2002, because it was the deciding factor for him to treat with Dr. Kinnard and undergo knee surgery. Although Claimant contends in his claim for compensation that his work conditions caused his knees to worsen over time, he lists May 10, 2002 as the date of an acute injury. Finally,

Claimant initially testified at the hearing that he did not know exactly when the shipyard was closing and was surprised when he was laid off at the end of May without receiving notice or a pink slip. However, on cross he admitted that he received notice of the closing in April, 2002, and knew he would be employed through May 28, 2002; this is also supported by the fact that Claimant applied for jobs with other shipyards in April, and May, 2002.

Inconsistent testimony relating directly to his employment, injury, and claim, impair Claimant's credibility especially regarding the May 10, 2002 fall. Nonetheless, I am convinced that work conditions aggravated Claimant's knee problems causing severe knee pain to the point he requested and Dr. Kinnard approved bilateral knee replacement on May 14, 2002.

C. Statute of Limitations

(1) Notice

Under 33 U.S.C. § 912(a) (2003), notice of an injury must be given by within thirty days after the injury, or, within thirty days of when the employee should have been aware of a relationship between the injury and the employment. However, where there is an occupational disease which does not immediately result in a compensable injury, the claimant has up to one year to provide notice to the employer. 33 U.S.C. § 912(a). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 585 (1st Cir. 1979); *Thorud v. Brady-Hamilton Stevedore Co.*, 18 BRBS 232, 235 (1986).

In the present case, Claimant contends he gave timely notice of his disability in that he filed his claim within 30 days of when he found out he had a compensable claim against Employer. I do not find that the evidence supports this position. At his deposition, Claimant testified the doctors at Chabert informed him his work in the shipyards was a contributing factor to the wearing out of his knees. Given that the evidence clearly indicates Claimant has had degenerative arthritis in both his knees since at least 1984; his work involved stress to the knees with climbing, crawling, walking, bending and stooping; his doctors related his knee condition in part to his work duties and seeing as he requested a transfer of job duties to accommodate his deteriorating knees, I find it reasonable to conclude Claimant knew, or had reason to know, that his knee condition was at least in part aggravated by his work duties at Employer since sometime in the 1980's when he

treated at Chabert, and well before he underwent bilateral knee replacement surgery or met with his attorney. As such, I find Claimant knew or had reason to know his employment was related to his disability when he had his surgery in May, 2002.

Further, as Claimant suffered an injury and not an occupational disease, he was required to provide notice within 30 days of the date he became disabled, May 14, 2002.[3] 33 U.S.C. § 12(a). Claimant testified and I find, Claimant informed Debbie Loup in Employer's Human Resources office of his knee replacement surgery between May 10 and May 13, 2002. Indeed, his termination notice indicates he was on "medical leave" from May 13, 2002 to May 31, 2002. I note with significance, that no medical leave forms were included in the personnel files submitted into evidence to contradict Claimant's assertion he informed Ms. Loup of the surgery. As Claimant testified, he had to seek approval for the surgery from Ms. Loup, as Employer's health insurance carrier paid for his knee replacement surgery. Moreover, Dr. Landry recommended the surgery as early as 1994, Dr. Kinnard agreed to perform it in 2002, and Employer's health insurance provider approved the surgery. Thus, even if Claimant had not provided timely notice and Employer did not have the opportunity to conduct a pre-surgical evaluation, I find Employer was not prejudiced in that the evidence indicates the surgery was reasonable and necessary treatment for Claimant's knee condition.

(2) Claim

Under Section 13 of the Act, a claim related to a traumatic injury must be filed within one year of the injury, but, this prescriptive period does not begin to run until the employee is aware, or should have been aware, of the relationship between the injury and the employment. 33 U.S.C. § 913(a). Here, Claimant became injured, and thus disabled, on the date of his surgery, May 14, 2002. As he filed his claim for compensation on November 3, 2002, said claim was timely filed.

[3] I note that while Claimant's injury manifested itself over a period of years and did not result in disability until 2002, it does not meet the requirements of an "occupational disease" in that it was not a disease caused by hazardous conditions peculiar to his employment. *See Grain Handling Co. v. Sweeney*, 102 F.2d 464, 465 (2d Cir. 1939) *cert. denied* 308 U.S. 570 (1939); *Director, OWCP v. General Dynamics Corp.*, 769 F.2d 66, 68 (2d Cir. 1985).

D. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Wright v. Connolly-Pacific Co*., 25 BRBS 161, 168 (1991). The Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.[4] 33 U.S.C. § 920(a). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 281 (1994).

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v.*

[4] This is not to say that the claimant does not have the burden of persuasion. To be entitled to the Section 20(a) presumption, the claimant still must show a *prima facie* case of causation. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

Atlantic Container Lines, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

In the present case, the credible evidence supports the fact that Claimant suffered a physical harm. He has had degenerative osteoarthritis in both his knees for approximately 30 years. This condition necessitated a bilateral arthroscopic surgery in 1988, a change in Claimant's job duties on at least two different occasions, and finally a bilateral total knee replacement in 2002 due to increased pain.

At the hearing Claimant testified, and it was supported by his medical records, that his degenerative knee condition was made worse by conditions at his work, which in part required him to walk, stoop, crawl and climb. Claimant testified at his deposition that the doctors at Chabert related the weakening of his knees in part to his work duties. Additionally, Dr. Kinnard testified that Claimant's work in the shipyard contributed to the aggravation and acceleration of his degenerative knee condition. This is implicitly evident in the fact that Dr. Kinnard testified he normally does not perform knee replacement surgery bilaterally or on patients as young as Claimant.

While there is conflicting evidence in the record surrounding a fall which Claimant may or may not have experienced outside of his office on May 10, 2002, I find it unnecessary to resolve this conflict inasmuch as I am convinced this fall did not aggravated Claimant's knee condition. Rather, the knee condition was aggravated by working conditions including walking and climbing which produced considerable pain causing Claimant to eventually seek out Dr. Kinnard and request bilateral knee replacement. Therefore, I find Claimant has invoked the Section 20(a) presumption.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995)(failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141,

144-45 (1990)(finding testimony of a discredited doctor insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986)(emphasis in original). *See also, Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003), *cert. denied* 124 S. Ct. 825 (2003)(stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp*., 14 BRBS 626, 628 (1982), *aff'd mem*., 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption").

In the present case, Employer did not submit any affirmative evidence that Claimant's knee condition was not aggravated or accelerated by his working conditions. At most, they claim the fall of May 10, 2002, did not cause his knee condition, thus, there is no work connection. However, this argument is far from complete, as Claimant was not basing his claim solely on the alleged fall, and Dr. Kinnard testified Claimant's work in the shipyard over 30 years contributed to the degeneration of his knees. Claimant testified his physicians at Chabert said the same thing. Indeed, Dr. Kinnard stated falling and striking a knee would not result in the need for a total knee replacement, inferring that Claimant's condition was long-standing. Employer provides no evidence to rebut Claimant's presumption that work conditions existed to aggravate the arthritis in his knees. Thus, I find Employer has failed to rebut the Section 20(a) presumption of causation.

E. Nature and Extent

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). Here, the parties do not dispute that Claimant has suffered a permanent disability. Dr. Kinnard testified Claimant would achieve MMI six months following his surgery, or on November14, 2002. He assigned a permanent impairment rating of 25% to each of Claimant's legs. Thus, I find Claimant is permanently disabled.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).

Here, the parties do not dispute that Claimant is unable to return to his former position as production control analyst. Dr. Kinnard testified Claimant was only capable of sedentary work duties. Specifically, he advised Claimant should not walk or climb so as to preserve the replacement parts in his knee. Although

Claimant's prior position was light duty and mostly desk work, it did involve a good amount of walking to deliver photographs, and climbing aboard vessels under construction to take photographs. Thus, based on Dr. Kinnard's restrictions, Claimant has established a *prima facie* case of total disability. Employer has submitted no vocational evidence of suitable alternative employment available to Claimant. Indeed, Employer did not even arrange for Claimant to meet with a vocational rehabilitation counselor. As such, I find Claimant is totally disabled.

Based on the foregoing discussion, I find Claimant is entitled to temporary total disability benefits from the date of his surgery, May 14, 2002, until he reached MMI six months later, or on November 14, 2002. I find he is entitled to permanent total disability benefits from November 15, 2002 to the present and continuing.

F. Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). An employee also has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b). In the present case, Claimant has only asserted a general claim for medical benefits to be paid by Employer; he concedes his surgery was paid for by Employer's health insurance provider and that he receives treatment at Chabert Medical Center, a charity hospital. I have already found Claimant suffered an injury compensable under the Act, for which he is entitled to permanent total disability benefits. I find he is also entitled to reasonable and necessary medical expenses arising out of his knee injury, including continuing follow up care from his surgery with a physician of his choice.

G. Penalties and Interest

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in

> subsection (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subsection (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e). *See also National Steel & Shipbuilding Co. v. Bonner*, 600 F. 2d 1288, 1294 (9th Cir. 1997); *Garner v. Olin Corp.*, 11 BRBS 502 (1979).

Assessment of a Section 14(e) penalty ceases whenever the employer complies with the requirements of Section 14(d) and files its notice of Controversion within fourteen days after receiving knowledge of the injury. *Oho v. Castle and Cooke Terminals, Ltd.*, 9 BRBS 989 (1979) (Miller dissenting); *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989). Even when the employer voluntarily pays compensation, the Section 14(e) penalty is applicable to the difference between the amount voluntarily paid and the amount determined to be due. *Alston v. United Brands Co.*, 5 BRBS 600 (1977). An employer, however, is not required to file a notice of controversion until a dispute arises over the amount of compensation due. *Mckee v. D.E. Foster Co.*, 14 BRBS 513 (1981) Section 14 (b) provides that the first installment of compensation become due on the 14th day after employer has been notified pursuant to Section 12 or the employer has knowledge of the injury. Thus, Employer had 28 days after notice of injury in which to controvert or face Section 14 (e) penalties.

Here, a dispute did not arise until Claimant filed his claim on November 3, 2002. Following this filing, Employer filed a First Report of Injury on November 26, 2002, but did not voluntarily pay compensation or timely file a Notice of Controversion. Indeed, the parties stipulate that Employer filed its notice of Controversion on June 12, 2003. Therefore, I find penalties are due and owing under Section 14(e) 28 days from the date the dispute arose, or December 1, 2002, until Employer filed its Notice of Controversion on June 12, 2003.

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of

compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et. al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

H. Attorneys' Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

I. Section 8(f) Relief

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that this partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir.1997). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

In establishing the occurrence of a second injury to the employee, it has been clearly established that a work-related aggravation of an existing injury constitutes a compensable injury for purposes of section 8(f). *Ashley v. Tide Shipyard Corp.*, 10 BRBS 42, 44 (1978); *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir. 1991), *aff'g* 22 BRBS 453 (1989). However, there must be a showing of actual aggravation. If the results are nothing more than a natural progression of the pre-existing condition, it cannot constitute the required second injury. *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), *aff'g Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986); *Souza v. Hilo Transportation & Terminal Co.*, 11 BRBS 218, 223 (1979). In the present case the record clearly shows that: (1) Claimant had a pre-existing permanent knee disability; (2) Employer was aware of such a disability and changed Claimant's work duties to accommodate his knee restrictions; and (3) such restrictions made his second injury (continued aggravation of knee symptoms due to work duties) more serious than it would have been absent such underlying pathology. Accordingly, I agree with Employer that it is entitled to Section 8 (f) relief effective May 14, 2002.

V. ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire record, I find as follows:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to 33. U.S.C. § 908 (b) of the Act for the period from May 14, 2002 to November 14, 2002, based on an average weekly wage of $734.00 with a corresponding compensation rate of $489.33.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to 33 U.S.C. § 908 (a) and 33 U.S.C. § 14 (e) of the Act for the 104 week period from November 15, 2002 to November 14, 2004, based upon an average weekly wage of $734.00 with a corresponding compensation rate of $489.33. Thereafter, the Special Fund shall commence payment of said benefits.

3. Employer shall pay Claimant interest on accrued compensation benefits. The applicable rate of interest shall be calculated at the rate equal to the 52 week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. § 1961. Employer shall also pay Claimant a Section 14 (e) 10% penalty for the period of December 1, 2002 to June 12, 2003 when it did not properly file its notice of controversion.

4. Employer shall pay Claimant for all past and future reasonable medical care and treatment arising out of work-related knee injuries pursuant to Section 7(a) of the Act.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE